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AUTHOR Hale, F. Dennis
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ABSTRACT

A study examined the quantity and quality of libel decisions of the Warren and Burger Supreme Courts to determine how changes in libel law came about, how individual justices voted on libel compared to other issues of freedom of expression, and how permanent constitutional libel rules will be as the more conservative Rehnquist Supreme Court takes over. All freedom of expression decisions were analyzed for the 16 years of the Warren Court, 1953-69, and the 17 years of the Burger Court, 1969-86. Data indicated that the Warren Court (1) did not become significantly involved in libel until the last six of its 16 years when it created the actual malice rule; (2) averaged two libel decisions per year; and (3) heard 16% of libel appeals. The Burger Court averaged 1.2 libel decisions per year and heard 6% of the libel cases appealed to it. During its last six years, the Warren Court was more of an activist court in the area of libel than the Burger Court. Findings also showed that libel defendants won 87% of the time under Warren, compared to 45% under Burger. (Three tables of data and 56 notes are included.) (MS)

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THE FEDERALIZATION OF LIBEL BY TWO SUPREME COURTS

by F. Dennis Hale
Professor
Department of Journalism
Bowling Green State University
Bowling Green, Ohio 43403

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THE FEDERALIZATION OF LIBEL BY TWO SUPREME COURTS

by F. Dennis Hale*

Public officials who sue for libel must prove that they were clearly identified and that a defamatory falsehood was published intentionally or recklessly. Most ordinary persons who sue for libel must prove that the press was negligent; however, to collect punitive damages a private person must establish intentional or reckless falsity. Also, in many libel suits the five libel elements must be established using the more demanding standard of clear and convincing proof; this compares with the lesser requirement that applies in other fields of civil law of preponderance of the evidence.

The source of this law is the First Amendment of the U.S. Constitution, a document that nowhere mentions libel or defamation. Libel has experienced a revolutionary metamorphosis under the two modern Supreme Courts headed by Earl Warren and Warren Burger. The modern version of highly federalized libel is sharply different from its form just twenty-five years ago when all a libel plaintiff had to prove were the three elements of publication, defamatoriness and identification.

Just how did this metamorphosis come about? What was added by the Warren Court and what was added (or taken away) by the Burger Court? How did individual justices vote on libel compared to other issues of freedom of expression? And how permanent are constitutional libel rules as the more conservative Rehnquist Supreme Court takes over?

These are major concerns of this study which examines the quantity and quality of libel decisions of the Warren and Burger Supreme Courts.

METHODOLOGY

All freedom of expression decisions were analyzed for the sixteen years of the Warren Court, 1953-69, and the seventeen years of the Burger Court, 1969-86. Free expression cases were identified by searching the indexes of Supreme Court Reporter under the entries of civil liberties, copyright, libel, obscenity, records, and telecommunications. This included both speech and press cases, and unsigned per curiam decisions as well as signed decisions. The resulting sample consisted of 199 decisions for the Burger Court and 63 decisions for the Warren Court.

Each decision was coded for the year it was filed, communications medium (newspaper, magazine, radio, television, book, spoken word, film, newsletter or memo, or other) and whether the decision favored the press or a person exercising speech rights.

Decisions were coded on whether they concerned libel or some other category of the law of freedom of expression such as access to government, copyright, obscenity, advertising, or reporter privilege. Libel included both forms of defamation: libel, or defamation by the written or broadcast word; and slander, or defamation by the spoken word. Because the actual malice doctrine is central to Supreme Court policy on libel, two privacy cases on actual malice were included in the libel sample. This resulted in an N of 15 libel decisions for the Warren Court, and 20 for the Burger Court.

Also coded was the participation of each judge on each decision. A judge could participate in three ways. First, the judge could vote to either support or reject claims concerning freedom of expression. Second, the judge could participate as either an author or a signer of an opinion. And third, the judge could join a majority, concurring or dissenting opinion. (Majority opinions announce the result and underlying rule and rationale; concurring opinions support the end result but not the rule or rationale; and dissenting opinions reject the result, rule and rationale of the majority.)

The number of libel decisions of the Supreme Court was compared with other measures of litigation. The Supreme Court accepts for full review fewer than 5 per cent of the cases appealed to it. The number of libel appeals per year was obtained from the annual index of United States Law Week under the entry, libel and slander. The number of appeals and full opinions per year was obtained from the annual statistical review of the Supreme Court published in each November issue of the Harvard Law Review.

Also coded were indicators of the importance of the libel decisions: number of pages of the majority opinion, number of amici curiae parties, and whether the case was annotated in the Supreme Court summary of the Harvard Law Review. Cases also were coded on the length of time between the Court hearing and formal decision, and the origin of the case (state or federal court). Lastly, majority, concurring and dissenting opinions of all decisions were examined.

Excluded from the analysis were four Warren Court justices (Stanley Reed, Robert Jackson, Harold Burton and Sherman Minton) who participated in fewer than eight free expression decisions each.

Analyzed were the other six justices who served on the Warren Court, seven justices who served under both Warren and Burger, and six justices who served exclusively on the Burger Court.

The justices who served on the Warren Court were Eisenhower nominees, Chief Justice Earl Warren and Charles Whittaker; Roosevelt nominee, Felix Frankfurter; Truman nominee, Tom Clark; Kennedy nominee, Arthur Goldberg; and Johnson nominee, Abe Fortas.

The seven justices who served under both chief justices were Roosevelt nominees, Hugo Black and William Douglas; Eisenhower nominees, John Harlan, William Brennan and Potter Stewart; Kennedy nominee, Byron White; and Johnson nominee, Thurgood Marshall.

The six justices who served only on the Burger Court were Reagan nominee, Sandra O'Connor; Ford nominee, John Paul Stevens; and Nixon nominees, Chief Justice Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist.

RESULTS

When the Warren Court and the Burger Court were debating freedom of expression, the discussion frequently concerned libel. The Warren Court decided 15 libel cases, second only to some 16 obscenity cases. And the Burger Court's 20 libel decisions was surpassed only by 36 obscenity and 42 access-to-government decisions.

Contrary to popular belief, the landmark Sullivan case of 1964 was not the first libel decision of the Supreme Court. In 1959 the Warren Court decided three libel cases, one on the Equal Time Provision of the Federal Communications Act, and two about privileged

communications of federal officials (Farmers Union, Howard and Barr). Even before Earl Warren became chief justice in 1953, the Supreme Court heard libel appeals from District of Columbia courts and from diversity of citizenship cases in which parties from different states sued each other in Federal District Court.[1]

However, few libel decisions were decided by the U.S. Supreme Court prior to the last six years of the Warren Court. During Warren's first ten years the Court averaged only 2 freedom of expression decisions and one-third of a libel decision a year. During its last six years the Warren Court averaged 7 free expression decisions and 2 libel decisions.

Under Burger, free expression decisions increased significantly to 12 per year, a 70 percent increase over the last six years of the Warren Court. This 70 percent change exceeded the 34 percent increase in the annual volume of signed opinions by the Burger Court compared to the Warren Court (see Table 1).

INSERT TABLE 1 HERE

While the Burger Court devoted a greater proportion of its time to freedom of expression than the Warren Court, attention devoted to libel dropped. While the Warren Court averaged 2 libel decisions its last six years, the Burger Court averaged only 1.2. The Burger Court' neglect of libel is dramatized further when one compares its output o libel decisions with the number of libel appeals. During its last six years the Warren Court agreed to hear 16 percent of the libel cases appealed to it, compared to a mean of 4.3 percent for all cases;

during its seventeen years the Burger Court agreed to hear 6 percent of libel appeals, compared to 3.7 percent for all appeals (Table 1).

The number of libel cases appealed to the Supreme Court closely mirrored changes in the Court's doctrine on libel. Prior to 1964 when the Court extended First Amendment protection to libel, only 3 or 4 libel litigants per year bothered to appeal to the high court. After the Court expressed a willingness to scrutinize state libel actions in 1964, the number of libel appeals increased to 11-18 per year. In 1971 in the Rosenbloom decision, it appeared that the Court had federalized all libel law and extended the constitutional protection of the Sullivan decision to virtually any subject matter that was newsworthy.[2] A journalism trade magazine was prompted to report that the law of libel had been all but repealed.[3] Libel plaintiffs must have sensed that the Supreme Court had become less sympathetic because for the three years following Rosenbloom, libel appeals dropped to the 11-13 range. Soon the Supreme Court rejected the liberal libel rule that emanated from a three-judge plurality opinion in Rosenbloom. Constitutional libel protection was constricted in the 1974 Gertz and 1976 Firestone decisions.[4] Apparently the law of libel had not been repealed. And for the three years, 1977-9, libel appeals increased to the 19-22 range. Then, in a pair of decisions in 1979, Proxmire and Wolston,[5] the Court further clarified its intent to limit Sullivan libel protection, and libel appeals soared to a mean of 29 during 1980-86, the last six years of the Burger Court.

The medium being sued was about the same under both courts. Combining Warren and Burger libel cases, 31 percent of libel suits involved newspapers, 23 percent magazines, 23 percent newsletters, 9

percent television, 6 percent personal letters or memos, 3 percent each radio, books and the spoken word, and 0 percent film. Or, 80 percent of the cases concerned print media, 12 percent broadcast media, and 9 percent personal communications. Somewhat surprising was the absence of libels concerning books, and the relatively large number (23 percent) of cases related to newsletters.

During the Warren Court, libel defendants won 87 percent of the time; this compared to 69 percent for other defenders of speech rights. During the Burger Court, libel defendants won 45 percent of the time, compared to 49 percent for other speech and press defendants.

Significantly, libel defendants won almost twice as often during the Warren Court. How else were the libel decisions of the two courts different or similar?

Some evidence suggests that the Warren libel decisions were more significant than the Burger decisions. Amicus curiae parties participated in 53 percent of Warren libel cases, versus 35 percent of Burger cases. (Of the total 27 such parties, 89 percent supported the press.) Some 60 percent of Warren libel decisions were annotated in the annual Supreme Court summary in the Harvard Law Review, compared to 35 percent for the Burger Court. The average length of the majority opinion was 8.1 pages under Warren and 9.0 pages under Burger.

Findings were mixed on whether the Burger Court was more fragmented on libel than the Warren Court. First, under Warren the average time between oral arguments and a final court decision for a libel case was 2.5 months, compared to 4.2 months under Burger. This indicated that Burger Court members were taking more time to reach a

consensus. However, both of the courts averaged 1.7 dissents per libel decision which was comparable to dissent levels for other free expression decisions and all other types of decisions.

The two courts were more similar than different concerning the origin of the cases. Some 80 percent of Warren libel cases came from state courts, compared to 45 percent of the Burger cases. (This could indicate that during the Warren years that state courts resisted the new federal limits on state libel actions. It also could indicate increased libel activity in Federal District Courts from diversity of citizenship cases during the Burger years.) Warren reversed trial courts 80 percent of the time, to 70 percent for Burger. And Warren reversed lower appeals courts 81 percent compared to 71 percent for Burger.

INSERT TABLE 2 HERE

A major concern of this study has to be, why did the Burger Court support libel defendants half as often as the Warren Court? A partial explanation is that the Burger Court faced more difficult and extreme libel cases than the Warren Court. One way to test that hypothesis is to compare the voting of the seven justices who participated on both courts. The mean support for libel defendants was 19 percent lower for the seven justices when they served on the Burger Court (see Table 2). This difference would be considerably greater if it were not for Black, whose support for the press remained at 100 percent, and for Douglas, whose support for libel defendants actually increased 13 percent under Burger to 100 percent (see Table 2). Excluding Black and

Douglas, who were close to being absolutist in the area of libel and political speech, the mean drop in support is even greater. The mean difference for the five justices--Harlan, Brennan, Stewart, White and Marshall--was 30 percent. This would tend to support the theory that the Burger Court faced libel situations close to the outer limits of constitutionally protected expression.

When all of the justices' votes are examined, two patterns are apparent. First, there was more variability in the voting of Burger Court members on libel than Warren Court members. Burger Court support for libel defendants ranged from 0 to 100 percent. Rehnquist was alone at the bottom with the 0. Then came five justices--Powell, Stevens, O'Connor, Burger and White--whose support ranged from 21 to 35 percent. In the middle were Blackmun and Stewart with 50 percent. Next came Marshall, 55 perent; Harlan, 60 percent; Brennan, 65 percent, and Black and Douglas, 100 percent. Harlan, Black and Douglas might not have had such high scores if they had participated during all seventeen years of the Burger Court.

On the Warren Court, support for libel defendants ranged from 50 to 100 percent. If Fortas, who participated in only half of the Warren libel cases, is eliminated, the range is further reduced to 67 to 100 percent. At the top were Black, Goldberg and Marshall with 100 percent, followed by White with 92 percent, Douglas with 87 percent and Brennan with 80 percent. In the 67 to 75 percent range were six justices: Frankfurter, Clark, Warren, Harlan, Whittaker and Stewart.

Members of the Warren Court, who wrote on a clean slate when they created constitutional protections against libel, simply were more cohesive when they voted to support the press in libel cases.

The second pattern in the justices' voting concerned the contrast between support for libel and support for other speech litigants. On the Warren Court, the mean support for libel defendants was 14 percent higher than for other speech defendants. For eight justices the difference ranged from 14 to 37 percent, for four justices there was little difference, and for one justice, Fortas, support was less for libel than for other speech litigants.

The Burger Court exhibited an opposite pattern. The mean support for libel defendants was 9 percent lower than for other speech litigants. This difference increased to 19 percent when three judges were excluded from the analysis who only served during the first years of the Burger Court (Black and Harlan served two years, Douglas six).

This pattern--that the Warren Court supported libel defendants more often than other speech litigants, and that the Burger Court supported libel defendants less often than other speech litigants--provides additional evidence that the Burger Court was dealing with libels that existed closer to the outer limits of constitutional protection. This hypothesis will be explored further by examining the characteristics of plaintiffs and defendants in the libel suits decided by the two courts.

INSERT TABLE 3 HERE

Before the analysis shifts to libel plaintiffs and defendants, the justices' voting will be examined to identify the architects of libel doctrine on the two courts. The focus thus changes from measuring support for the press to identifying support for a Court's majority. Table 3 indicates how often the justices authored a majority opinion on libel, how often they authored any kind of opinion on libel or other speech cases, and how often they agreed with the court majority on libel or other speech matters.

On the Warren Court, Brennan and Harlan each wrote more than a fourth of the majority opinions on libel. And Brennan was the author of the most important opinions that created the actual malice rule and extended it to criminal libels and appointed government officials. The justices who agreed the most with the Court's libel majority were Clark and White. When authorship of concurring and dissenting opinions is added to that of majority opinions, Black and Douglas join Brennan and Harlan as the most active justices.

On the Burger Court, conservative and moderate justices--Stewart, Powell and Rehnquist--wrote most of the majority opinions; however, no justice dominated the field the way Brennan did during the Warren Court. And centrists Powell and Blackmun agreed with the Court majority more than any other judges. When concurring and dissenting opinions are included, Brennan, Stewart and White emerge as the leading authors.

The leading First Amendment liberals, Douglas and Black, frequently wrote concurring or dissenting opinions advocating absolute protection for the press against libels concerning political speech.

But neither wrote very many majority libel opinions for either court.

Eventually the focus must shift from how the judges voted to what they were voting on or, in this study, the nature of the libel plaintiffs who faced the two Supreme Courts.

With few exceptions, Warren libel decisions concerned remarks by or about elected officials or high-ranking government employees. This was even true of the three libel cases decided before Sullivan: Farmers Union concerned two candidates for the U.S. Senate and a farmers cooperative, Howard dealt with remarks shared with Congress that were made by a Navy captain who supervised the Boston Naval Shipyard, and Barr involved statements about employees of the U.S. Office of Rent Stabilization made by the acting director in a press release.[6] In decisions in 1964 and 1965, Sullivan involved criticism of an elected commissioner of a major Southern city, Garrison concerned a district attorney's complaints about local judges, and Henry concerned criticism of a police chief and county attorney.[7] The nine other libel decisions by the Warren Court concerned: the supervisor of a county recreation program (Rosenblatt), criticism of a police chief and sheriff by a union organizer (Ashton), the athletic director at the major public university in a state (Curtis Publishing Co.), a retired general and political activist demonstrating against the integration of a state university (Associated Press), the clerk of a county court running for re-election (Beckley), statements of a candidate for the legislature about a deputy sheriff (St. Amant), a public teacher's criticism of the school administration in a letter to the editor (Pickering), criticism of a factory's management made during a union's organization campaign (Linn), and press coverage of

the opening of a play that portrayed a real family that had been held hostage by escaped felons (Time).[8] With the exception of the last two cases, Warren libel decisions dealt with elected officials, high-ranking government employees or efforts to petition government--matters at the heart of political speech. As to the two exceptions, Linn involved the kinds of caustic claims and counterclaims that are commonplace in labor negotiations, and Time applied actual malice libel protection to a privacy suit that stemmed from two newsworthy events, the opening of a new play and a family held hostage by escaped prison inmates.

Thus 87 percent of Warren libel decisions dealt specifically with criticism of, or the comments of, elected officials or important government employees. By contrast, only 35 percent (7 of 20) of Burger libel decisions directly concerned government officials: a land developer and legislator negotiating with a city council (Greenbelt), a candidate for the U.S. Senate (Monitor Patriot Co.), a police officer accused of brutality in a federal document (Time), a mayor running for county assessor (Ocalla Star-Banner Co.), a U.S. senator's criticism of governmental agencies for grants awarded a researcher (Hutchinson), criticism of a lieutenant colonel who claimed knowledge of war atrocities (Herbert), and criticism of a lawyer seeking a presidential appointment as a U.S. attorney (McDonald).[9] Another 25 percent of Burger libel decisions concerned individuals at the periphery of government; these libel plaintiffs were caught up in government activities but were not themselves government officers or employees: a dealer in nudist magazines charged with obscenity (Rosenbloom), a private attorney representing the parents of a youth

accidentally killed by a policemen (Gertz), a socialite suing her wealthy husband in divorce court (Time), a man cited for contempt for failing to appear before a grand jury investigating Soviet espionage (Wolston) and an owner of convenience stores accused of having underworld ties and of improperly influencing state liquor authorities (Philadelphia Newspapers).[10] Some 25 percent of Burger cases concerned prominent persons or organizations involved in newsworthy--but not necessarily governmental--events: the leader of a religious cult (Seattle Times), a manufacturer of high fidelity speakers (Bose), a Hollywood film actress (Calder), the assistant publisher of a girlie magazine (Keeton) and a national, conservative lobbying organization (Anderson).[11] Lastly, 15 percent of the Burger decisions involved private persons who arguably were not directly involved in newsworthy events: postal employees who were not members of their union (Letter Carriers), a woman whose husband was one of 44 people killed in a six-month-old bridge collapse (Cantrell) and a solvent building contractor who was falsely accused of filing for bankruptcy (Dun & Bradstreet).[12]

Certainly there is room for disagreement about which cases should be placed in the preceding categories. Some would argue that when a private attorney such as Elmer Gertz represents a client in court, he is an officer of the court and is no different than a government official such as a judge or sheriff; Gertz then would belong in the category of political speech in which it is most difficult to sue for libel. And some would argue that a woman such as Mrs. Cantrell is just as newsworthy six months after her husband is killed in a bridge accident as she was on the day of the accident. And some would argue

that the possible bankruptcy of a local business is just as newsworthy as an act of a government agency or an elected official.

In conclusion, libel decisions of the Burger Court came from a greater variety of categories than those of the Warren Court; and a smaller percentage of Burger decisions concerned hard-core political speech. Also, a certain amount of subjectivity is inevitable in categorizing libel suits according to the newsworthiness of the topic, involvement of government, or the role of the participant.

The creation of discrete categories with varying levels of protection against libel became a preoccupation of the two Supreme Courts after Sullivan was decided in 1964. The definition and subsequent breadth of such libel categories lies at the heart of the following analysis of how much libel protection was created by the two Supreme Courts.

Even before Sullivan, the Warren Court indicated that it was passionately devoted to wideopen political speech, but divided about precisely how much protection to give such speech. In WDAY the Court interpreted the Federal Communications Act to grant broadcasters absolute immunity to libel suits when they present political rebuttals to comply with the Equal Time Provision. Four judges dissented.[13] And in Barr the Court granted federal officials an absolute immunity against libel suits. Four justices dissented, including liberals Warren and Douglas who, arguing for a qualified protection, said the absolute protection would "sanctify the powerful and silence debate."[14] And in an uncharacteristic deference to judicial restraint, a dissenting Brennan said that the policy decision was "better the business of the legislative branch."[15] The dissenters worried that the

right of citizens to criticize government would be dampened if public officials were armed with absolute immunity for their speech.

In Sullivan the advocates of a qualified protection won out when the Supreme Court, for the first time, created a constitutional barrier to state libel actions. The Court ruled that public officials who sue for libel must prove that the defamatory falsehood was published with actual malice, which was defined as with knowledge of its falsity or with reckless disregard of the truth. The Court also required public officials to establish very specific identification in such suits. Three concurring justices--Black, Douglas and Goldberg--argued for an absolute protection for critics of public officials.[16] That debate about whether the constitution should provide absolute or qualified protection against libel, and in what situations the constitutional protection should apply, occupied the Court in Sullivan and most subsequent libel cases. The term, public official, dominated the majority and concurring opinions in Sullivan. But the libel plaintiff, Sullivan, was an elected official and not an appointed official or civil service employee. It was clear that elected officials were covered by the new constitutional rule. And it was strongly implied that the rule applied to high-ranking policy-makers in government, whether they were elected, appointed or civil service. But the precise determination of who in government would have to prove knowing or reckless falsity in libel suits was left to another day. Also unclear was whether the actual malice rule applied to all aspects of a public official's life. Both the majority and concurring decisions specifically referred to libels concerning the official conduct of public officials, implying that the rule did

not extend to some private aspects of a public official's life.

Just eight months later, in Garrison, the Warren Court decided that the actual malice rule applied to all criminal libel suits. In Garrison, as it would in other cases, the Court started to expand on what it meant by actual malice and how juries should be instructed. Specifically the Court said that actual malice concerned "those false statements made with a high degree of awareness of their probable falsity."[17] Equally important, in considering the distinction between official conduct and private conduct of public officials, the Court ruled that "anything which might touch on an official's fitness for office is relevant." That was an expansive reading as it could be argued that virtually anything about a public official relates to fitness for office.

The Court moved quickly to decide which employees in government must prove actual malice. Two years later in Rosenblatt the actual malice rule was extended to a nonelected public official, the supervisor of a county recreation program. The Court said constitutional libel protection extended to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."[18] A courthouse custodian or public kindergarted teacher was not a public official. But most government employees who appeared in the evening news or on the front page were public officials under the Court's expansive definition. The Court did not arrive at this conclusion easily. Although there was only one true dissenter, the Court was extremely divided in Rosenblatt. One judge dissented, four judges wrote separate concurring opinions, and one

judge concurred without an opinion

When dealing with libel at the heart of government, or political speech, Warren Court members agreed about protecting the press. The biggest disagreement was between Douglas and Black, who wished to provide absolute protection to the press, and the moderate liberals such as Brennan and Stewart who favored the qualified protection provided by the actual malice rule. Black and Douglas expressed these sentiments in concurring opinions in Sullivan and in concurring comments in subsequent cases. Black participated in 12 such concurrences on the Warren and Burger courts, and Douglas participated in 15. During his three years on the Court, Goldberg joined Black and Douglas on three such occasions.

The Warren Court's unanimity disappeared when it tackled libels outside of political speech. The Court became so fragmented on its one actual malice case involving privacy, and its two cases involving the expansion of the actual malice rule to public figures, that it failed to get a five-judge majority to support a rule of law. In 1982 a retired U.S. general participated in demonstrations in opposition to the enrollment of a Black student at the University of Mississippi. The Court agreed that the Constitution should provide some protection against such libel suits in which the purposeful activity of the plaintiff amounted to thrusting his personality into the vortex of an important public controversy.[19] Thus the Court extended Constitutional libel protection to public figures. But the Court disagreed on precisely what protection to extend to the press. The majority opinion, backed by four justices, favored a form of gross negligence--highly unreasonable conduct constituting an extreme

departure from the standards of reporting ordinarily adhered to by responsible publishers.[20] Three judges favored the actual malice rule for the case, and Black and Douglas favored absolute protection. The justices voted identically in a companion case involving the athletic director at a public university. Technically, the athletic director was not a public official because he was paid by a private foundation and not by the state university. But the Court extended First Amendment protection to the case because it concluded that the athletic director was a public figure by status alone.[21]

The third public figure case of the Warren Court involved false-light privacy or fictionalization, and not libel. A magazine reported on the opening of a play which was based on a fictional book which had been based on a real family that had been held hostage by escaped prisoners. The majority opinion of three judges ruled that the actual malice rule applied to such privacy suits involving matters of public interest. The majority returned the case to the state court for a retrial, indicating that a jury could find actual malice. Black and Douglas, concurring, favored absolute protection for the press, characterizing the Life magazine account as "at most a mere understandable and incidental error of fact in reporting a newsworthy event."[22] However, four dissenters wanted to apply the less demanding standard of negligence to the case instead of actual malice. Fortas, joined in his dissent by Warren and Clark, described the article as a reckless and irresponsible assault upon the family.[23]

In conclusion, the Warren Court had difficulty when it moved away from libels that were not at the heart of political speech. The Court extended constitutional protection to two types of public figures: a

person of status (represented by a university athletic director), and a person who thrust himself into the vortex of a public controversy (represented by a retired general who demonstrated against the integration of a state university). It is difficult to imagine more clear-cut examples of public figures. Despite this apparent clarity, the Court was divided on whether to apply absolute protection, gross negligence or actual malice to such cases. The Court was even more divided--negligence, actual malice, or absolute protection--about a constitutional standard for a false-light privacy case. In should be noted that false-light privacy is particularly threatening to the press because, unlike libel, defamatoriness is not a required element. This was the state of libel law when the era of the Warren Court ended in 1969

After the Warren Court created and defined the actual malice rule and applied it to political speech, the Burger Court wrestled with two kinds of libel questions: how far should the actual malice rule be expanded to protect libels at the periphery of political speech and in the realm of nonpolitical speech, and how should First Amendment limitations be applied to collateral libel matters such as summary judgment, falsity and venue?

About half of the Burger libel decisions concerned collateral libel issues, including four which expanded press protection. In Philadelphia Newspapers the Court ruled that in libel suits about public issues, the plaintiff had to prove falsity. [24] In Bose Corp. the Court said that the Constitution mandated that appeals courts conduct an independent review of the case record to affirm the existence of clear and convincing proof of actual malice.[25] In

Anderson the Court required judges to apply a heightened standard when they determine in a pretrial summary judgment if there is sufficient evidence of actual malice to allow the case to go to trial.[26] And in Letter Carriers the Court ruled that the actual malice rule applied to a union's criticism of its members at a time when there were no contract negotiations.[27] The four decisions provided the press with new protection against libel at the pretrial, trial, and appeals stages.

In three other important collateral decisions, the Court refused to expand libel protection for the press. In Herbert the Court refused to place First Amendment limits on the use of pretrial discovery to question journalists in actual malice cases about newsroom conversations and their evaluations of news sources and story tips.[28] And in companion decisions, Keeton and Calder, the Court allowed libel suits to be initiated in states in which a magazine's only contact was its regular circulation.[29]

Two collateral libel decisions that limited expression were less important. In McDonald the Court ruled that the actual malice rule provided sufficient protection for libelous letters mailed to government officials.[30] And in Seattle Times the Court upheld the right of a state court to prevent a libel defendant from publishing information it obtained through the pretrial discovery process.[31]

Thus in collateral areas of libel, the press won some major victories under the Burger Court. Most of the press losses consisted of the press losing a minor case, or the Court refusing to create a new protection for the press.

A similar pattern was evident in the Burger Court's decisions that dealt specifically with the application of the actual malice rule. The Court started out unified. There was only one dissent in the Court's first four libel decisions in which it ruled in favor of the press (Greenbelt, Monitor Patriot, Time and Ocala Star-Banner).[32] However, none of the cases required a major expansion of the actual malice rule and all concerned matters at the heart of political speech. As previously mentioned, the four plaintiffs were a state legislator, a U.S. Senate candidate, a police officer criticized in a federal report, and a mayor running for county tax assessor.

This unanimity faded when the Burger Court faced a libel plaintiff who was quite different from any faced by the Warren Court. Rosenbloom was not an elected official or an appointed official; nor was he a public figure in either the mold of a university athletic director or an anti-integration demonstrator. As a dealer in nudist magazines who had been arrested for obscenity, Rosenbloom represented private persons caught up in a matter of public concern. Three justices--Brennan joined by Blackmun and Burger--reversed the jury's $750,000 verdict and ruled that private personalities such as Rosenbloom must prove actual malice.[33] Two justices concurred: White favored actual malice for matters of legitimate public interest, and Black favored absolute protection for the press for matters of general or public interest. Douglas, who ordinarily concurred with Black on libel, did not participate in the case. Three justices--Harlan, Marshall and Stewart--favored constitutional limits on damages instead of such a dramatic expansion of the actual malice rule. With the Rosenbloom decision it appeared that six members of the Court favored

the actual malice rule or absolute protection for the press when it reported on government affairs--which included most public controversies and most of the stories that resulted in libel suits.

Three years later in the Gertz case a new Court majority created a new libel doctrine. This case also dealt with a private person involved in a matter of public concern--the private attorney for a mother and father who were suing police over the shooting death of their son. In the intervening three years since Rosenbloom, Black, one of the Court's strongest defenders of the press, and Harlan, had been replaced by President Nixon's last two appointees, Powell and Rehnquist. And the other two Nixon appointees, Burger and Blackmun, as well as Kennedy appointee, White, apparently had changed their mind about how much libel protection the press deserved. The result was that five judges agreed that the lesser standard of fault applied in such instances--and not actual malice. However, the majority also agreed that punitive damages could not be awarded without proof of actual malice. Powell wrote the majority opinion, joined by Stewart, Marshall and Rehnquist. Blackmun concurred, in part to form a majority to contribute to certainty in the law. Two justices, Burger and White, dissented because they felt a negligence or fault requirement for most libel suits provided too much protection for the press. And two other justices, Brennan and Douglas, dissented because they felt that negligence provided insufficient protection for the press.[34]

This fault doctrine was strengthened in the next three decisions that distinguished between private personalities and public figures and defined the scope of constitutional libel protection. Two years later in Time the Court applied the lesser fault requirement to a

civil divorce trial involving one of the richest families in America.[35] This time seven judges--two more than in Gertz--either joined or concurred with the majority opinion. And in 1979 the Court applied the fault standard--and not actual malice--to a man found in contempt of court for failing to appear before a federal grand jury investigating espionage, and to a scientist who had received $500,000 in government grants and who had been ridiculed by a U.S. senator.[36] Only one justice, Brennan, dissented in both cases. And neither dissent was entirely supportive of First Amendment rights. In the U.S. senator case, Brennan based his arguments on the Speech and Debate Clause of the Constitution--not the First Amendment. And in the espionage case, Brennan rejected a summary judgment in support of the press in favor of a trial on the merits of the case.

Thus the Burger Court started out just as divided as the Warren Court when it dealt with libels of persons not employed by government. But by the tenth year of the Burger Court, 1979, the justices largely agreed that the actual malice rule should be restricted to hard-core political speech and two narrowly defined categories of public figures, and that the lesser constitutional standard of fault should apply to most other libels.

Up to this point every libel case decided by Warren and Burger had concerned matters at the heart of political speech--comments of or about government officials--or they had concerned matters of legitimate public interest such as government projects or activities. A dichotomy had been created: the actual malice rule applied to a limited range of libel situations, and the fault requirement applied to other libels. However, the Court had not dealt with libel that was

of questionable public interest.

This the Court did in 1985 (Dun & Bradstreet) in examining a false allegation of bankruptcy about a local contractor that had been circulated to five business clients. Five justices (Powell, Rehnquist and O'Connor, with Burger and White concurring) decided that a third category of libel existed--matters of purely private concern--which did not enjoy the constitutional protections that had been enunciated in Gertz. The majority defined matters of private concern as speech solely in the individual interest of the speaker and its specific business audience.[37] Four justices (Brennan, Marshall, Blackmun and Stevens) dissented, arguing that Gertz had applied to any false statement, regardless of its public importance. The dissenters also argued that the potential bankruptcy of a local business was a matter of public importance, and that the majority had created an "impoverished" definition of matters of public concern.

Thus during its final years the Burger Court favored a trichotomous approach to constitutional libel protection: actual malice for political speech, fault for matters of legitimate public interest, and no constitutional limits for matters of purely private concern. The Court was most divided about the existence of the third category, matters of purely private concern.

CONCLUSIONS

The 1985 decision of Dun & Bradstreet is a logical starting point for a discussion of the status of constitutional libel law that has resulted from 33 years of two modern Supreme Courts. Five justices in

Dun & Bradstreet wished to create a category of purely private libel which enjoys few constitutional protections. Two of the five justices, Powell and Burger, have retired from the Court. Thus that doctrine remains very much in doubt. In the future the Court could overrule the decision, claiming it was the product of a three-judge plurality opinion. Or a future Court could so expand the category, matter of public interest, that very few cases could be classified as purely private concerns. As an example, in a concurring opinion in Rosenbloom, Justice White suggested that matters of public concern include speech "which is essential to the continued function of our free society." He would have granted the media the "privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or privacy of an individual involved in or affected by official action be spared from public view."[38] And in Rosenblatt Justice Douglas offered an even broader definition of matters of public concern: government employees such as the night watchman, file clerk or typist; anyone on the public payroll; government contractors, industrialists and labor leaders; and speech about science, the humanities, the professions and agriculture.[39]

Dicta in Dun & Bradstreet also sheds light on the current status of constitutional libel law. First, in a concurring opinion, Burger said that it was time to re-evaluate the actual malice rule and to consider replacing it with a requirement of reasonable care.[40] And second, White explained in a lengthy concurring opinion why he had grown dissatisfied with the actual malice and fault requirements. He said the constitutional barriers prevent a defamed individual from

clearing his or her name. White said that constitutional limits on damages, instead of actual malice or fault, would effectively protect the press from excessive libel threats. White primarily objected to the actual malice rule because of the vulnerability it created for libel plaintiffs. However, White also expressed doubt that the press was better off under the actual malice rule because of the advent of a protracted and expanded discovery process in recent years.[41] Twenty-one years earlier in a concurring opinion in New York Times, Justice Douglas said that the actual malice rule provided the press with only questionable protection. Douglas said that the Alabama jury would have sided with the local libel plaintiff, Sullivan, even if the actual malice rule had been required.[42]

Burger and White were alone in calling for abolishment of the actual malice rule in Dun & Bradstreet. As Brennan noted in his dissent in the case: "The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of New York Times Co. v. Sullivan continue to command in the jurisprudence of this Court."[43] This statement accurately describes the current status of the law concerning the application of the actual malice rule to political speech. The law is pretty well settled. In the third year of the Burger Court, with two of Nixon's four appointees on board, the Court agreed unanimously that the actual malice rule applied to virtually any aspect of a political candidate's life. Stewart's majority opinion said that "Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase 'official conduct.'" And it added: "Given the realities of our political life, it is by no means easy to

see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."[44]

Court members also agree that the actual malice rule should only be extended to two very narrow classifications of public figures outside of government. These categories were described in 1979 in Wolston: "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[45] These two categories of public figures are almost identical to those created by the Warren Court in the companion cases in 1967, Associated Press and Curtis Publishing Co.[46]

Two justices in 1967, Douglas and Black, wished to replace the actual malice rule with a complete press immunity to libel. It was never clear if Douglas and Black wished to abolish all libel. In 1974 in Letter Carriers in his next to last year on the Court, Douglas wanted to extend such absolute protection to the possible libel of two nonunion postal workers by a union newsletter. The libel was not related to a raging political issue or a collective bargaining election--just the continuing existence of four percent of the workers who would not join the union. Douglas noted: "The extensive damages awarded in this case will illustrate that any protection short of a complete bar to suits for defamation will be cold comfort to those who enter the arena of free discussion in labor disputes."[47] Douglas and Black would have extended absolute protection against libel at a

minimum to matters of public concern. Today no members of the Supreme Court wish to extend such protection even to political speech.

One concern of the two absolutists was the growing complexity and subjectivity of libel law which made it difficult for a layperson--even a lawyer--to know with any certainty if a message was libelous. Thus Black observed in a concurring opinion in Curtis Publishing Co.: "The Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings."[48] Black made a similar observation eight years earlier in his pre-New York Times opinion in Farmers Union: "Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question....Such issues have always troubled courts."[49] Examples from four cases demonstrate that even when the justices agreed on the rule of law, they disagree on the application of the rule. In Greenbelt Cooperative the majority said that even the most careless reader must read the use of the word, blackmail, as amounted to no more than rhetorical hyperbole, a vigorous epithet used by those who considered the plaintiff's negotiating position extremely unreasonable. A concurring Justice White disagreed.[50] Justices also disagreed about the defamatoriness of the message in Letter Carriers. Postal workers who refused to join the union were labeled scabs in the union newsletter, and author Jack London's six-paragraph definition of a scab was reprinted. Included in the definition were: "The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from

his employer." And, "A SCAB is a traitor to his God, his country, his family and his class." The majority characterized the quotation as "merely rhetorical hyporbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuced to join." The three dissenters disagreed.[51] In Time, Inc. Justices Black and Douglas called the Life magazine account "at most a mere understandable and incidental error of fact in reporting a newsworthy event." Dissenters Fortas, Warren and Clark called the story a "reckless falsity" which "irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal."[52] And in Firestone the justices disagreed about the application of two major rules. A dissenting Justice Marshall insisted that the plaintiff, Mrs. Firestone, was a public figure; the majority disagreed. Justice White said he could agree with the Florida Supreme Court which had called the Time magazine article a "flagrant example of 'journalistic negligence.'" Justices Powell and Stewart said that Time may have been reasonably prudent in researching the article.[53]

Justices also have expressed concern and disagreement in these libel cases about the most fundamental of all legal questions: the appropriateness of its decision making. In the first Warren Court decision on libel, a dissenting Justice Brennan reasoned that the Supreme Court was poorly equipped to determine whether qualified or absolute privilege was the appropriate standard for protecting government officials from libel suits. Brennan posed eight questions which he said should be answered in making such a policy choice, including: "To what extent does fear of litigation actually inhibit

the conduct of officers in carrying out the public business? To what extent should it? Where does healthy administrative frankness and boldness shade into bureaucratic tyrrany?" Brennan said such questions represented "the resolution of large imponderables which one might have thought would be better the business of the Legislative Branch."[54] Twenty-five years later a member of the Burger Court expressed a similar idea concerning the 1974 Gertz case. A dissenting Justice White objected to the sweeping federalization of the libel law and the scuttling of the libel laws of the states "in such a wholesale fashion." He complained that "the Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides."[55]

Data from this study also indicated that in the expansive area of policy making in libel, that the Supreme Court appeared to operate in a vacuum. Amicus curiae parties, or friends of the court, participated in 53 percent of Warren libel cases and 35 percent of Burger cases. However, 89 percent of such parties represented speech advocates or the press. Defenders of reputational rights were largely missing. Also, in reaching its libel decisions the Supreme Court rarely invoked any empirical research to illuminate the existing or potential burdens created by alternative libel policies. The Court was unwilling to utilize social science data as it has in such areas as racial discrimination, antitrust and electoral apportionment to examine the relative costs and benefits of contrasting policies on constitutional libel. One reason for this lack of social science data in Court libel opinions is that neither the academic nor professional community has conducted or published such data. And the Supreme Court is not

equipped to conduct such research itself or to commission it. This creates a quandary. There exist compelling reasons for making libel law a matter of national law and a matter of constitutional law. This is best accomplished when libel is defined by the U.S. Supreme Court and not by Congress or the state legislatures or state appellate courts. However, the Supreme Court is poorly equipped to gather the kind of social science data that would assist it in choosing the proper policies in libel.

A major purpose of this study was to compare the quantity and quality of libel decisions of the Warren and Burger courts, and to assess the libel contributions of the two courts. The Warren Court did not become significantly involved in libel until the last six of its sixteen years when it created the actual malice rule, averaged two libel decisions per year and heard 16 percent of libel appeals. The Burger Court averaged 1.2 libel decisions per year and heard 6 percent of the libel cases appealed to it. During its last six years the Warren Court was more of an activist court in the area of libel than the Burger Court.

Even more significantly, libel defendants won 87 percent of the time under Warren, compared to 45 percent under Burger. Was this a reflection of a pro-press Warren Court and an anti-press Burger Court? It was not that simple. This disparity in libel resulted in part from differences in the composition of the cases. The Burger Court considered more cases from the outer limits of protected political speech. Some 87 percent of Warren libel cases dealt with criticism of, or comments of, elected officials or high-ranking government officers. This compared to 35 percent for the Burger Court. The justices who

served on both courts supported libel defendants less often while on the Burger Court. Excluding the two First Amendment absolutists, the five justices who served on both courts supported the press 30 percent less often in libel cases before the Burger Court. And the seven justices who served on both courts supported libel defendants more often than other speech and press defendants on the Warren Court, and less often on the Burger Court. All of this indicates that the Burger Court dealt with libel cases that were closer to the periphery of hard-core political speech. It is true that the Burger Court refused to expand the actual malice rule to cover matters of public interest or broadly defined public figures. However, the Warren Court also refused to expand the actual malice rule in these directions. And when the Warren Court dealt with the libels of public figures, it relied on a narrow definition of public figures and could not agree upon what standard of fault to apply.

It is not surprising that in 1974 when the Burger Court ruled against the press in the Gertz libel case that the press responded in anger. During the sixteen years of the Warren Court, a constitutional libel defense was created and the press won 87 percent of its libel suits. During the first six years of the Burger Court, the press won 100 percent of its six libel suits, including Rosenbloom which appeared to make the press libel proof. When the Gertz opinion erased the pro-press Rosenbloom plurality opinion, it appeared to journalists that rights were being taken away. This same phenomenon has occurred with other libel and press doctrines. The press reacts when it appears that a right or privilege has been taken away. Another example is the Herbert decision in which the Supreme Court refused to shield newsroom

conversations and the subjective opinions of journalists from judicial inquiry. Some members of the press thought that the decision took away an established right. This resulted in part because the press had won at the Court of Appeals level. However, that decision was fragmented with the three judges divided with a majority opinion, a concurring opinion and a dissenting opinion. The Court of Appeals decision never should have been viewed as anything more than a temporary, fragmented decision of a three-judge panel of an intermediate court of appeals.

TABLE 1. LIBEL CASE LOAD OF TWO MODERN SUPREME COURTS

WARREN SUPREME COURT					BURGER SUPREME COURT				
Term	Total Appeals	Total Decisions	Libel Appeals	Libel Decisions	Term	Total Appeals	Total Decisions	Libel Appeals	Libel Decisions
1953	1,293	78	4	0	1969	3,357	94	20	1
1954	1,352	82	3	0	1970	3,318	122	13	4
1955	1,630	94	4	0	1971	3,645	151	17	0
1956	1,670	115	4	0	1972	3,748	164	12	0
1957	1,765	119	4	0	1973	3,876	157	13	2
1958	1,763	112	5	3	1974	3,847	137	11	1
1959	1,787	105	2	0	1975	3,806	156	14	1
1960	1,911	118	3	0	1976	4,006	142	14	0
1961	2,142	96	6	0	1977	3,845	135	20	0
1962	2,324	117	14	0	1978	3,943	138	22	3
1963	2,401	127	11	1	1979	3,812	149	19	0
1964	2,180	101	13	2	1980	4,280	138	29	0
1965	2,683	107	11	3	1981	4,456	167	17	0
1966	2,890	119	12	3	1982	4,188	162	33	0
1967	2,946	127	11	3	1983	4,162	163	26	4
1968	3,117	122	18	0	1984	4,269	151	37	2
					1985	4,289	159	29	2
Means	2,131	109	8	1		3,932	146	20	1

TABLE 2. VOTING OF JUSTICES ON LIBEL AND OTHER SPEECH CASES

Justice*	Pro-Press on Libel	N of Libel Cases	Pro-Press on Other Cases	N of Other Cases
Burger Court				
Black*	100%	5	60%	12
Douglas*	100%	7	92%	59
Harlan*	60%	5	33%	9
Brennan*	65%	20	77%	176
Stewart*	50%	12	66%	133
White*	35%	20	44%	179
Marshall*	65%	20	76%	172
Burger	30%	20	57%	179
Blackmun	60%	20	45%	176
Powell	21%	14	49%	158
Rehnquist	0%	15	29%	164
Stevens	25%	12	61%	114
O'Connor	25%	8	47%	45
Warren Court				
Black*	100%	15	74%	47
Frankfurter	67%	3	46%	13
Douglas*	87%	15	89%	45
Clark	75%	12	47%	32
Warren	73%	15	71%	48
Harlan*	73%	15	43%	46
Brennan*	80%	15	75%	44
Whittaker	75%	4	44%	9
Stewart*	71%	14	72%	39
White*	92%	12	55%	33
Goldberg	100%	3	86%	14
Fortas	50%	8	64%	22
Marshall*	100%	3	75%	12

*Justices who served on both courts.

TABLE 3. PARTICIPATION OF JUSTICES IN LIBEL, OTHER SPEECH CASES

Justice*	Majority Libel Author	Libel Author	Other Speech Author	Agreement on Libel	Agreement on Other	N of Cases
Burger Court						
Black*	0%	100%	50%	100%	70%	17
Douglas*	0%	43%	59%	71%	51%	66
Harlan*	0%	40%	67%	60%	91%	14
Brennan*	5%	55%	41%	70%	60%	196
Stewart*	42%	58%	29%	83%	80%	145
White*	10%	50%	30%	80%	88%	199
Marshall*	5%	20%	25%	80%	64%	192
Burger	10%	20%	37%	80%	86%	199
Blackmun	0%	10%	28%	95%	85%	196
Powell	21%	43%	33%	93%	89%	172
Rehnquist	27%	40%	37%	73%	76%	179
Stevens	8%	17%	44%	83%	69%	126
O'Connor	13%	13%	67%	88%	91%	53
Warren Court						
Black*	7%	73%	47%	87%	68%	62
Frankfurter	0%	33%	38%	67%	85%	16
Douglas*	7%	40%	47%	73%	78%	60
Clark	7%	8%	44%	92%	69%	44
Warren	0%	27%	27%	73%	94%	63
Harlan*	27%	40%	48%	87%	65%	61
Brennan*	27%	53%	30%	80%	93%	59
Whittaker	0%	0%	0%	74%	89%	13
Stewart*	0%	14%	31%	86%	87%	53
White*	8%	17%	33%	92%	79%	45
Goldberg	0%	67%	29%	100%	79%	17
Fortas	0%	50%	18%	50%	86%	30
Marshall*	13%	33%	25%	100%	100%	15

*Justices who served on both courts.

FOOTNOTES

*The author is a professor in the Department of Journalism at Bowling Green State University. Some of the data in this article also appeared in the author's paper, A Comparison of the Warren and Burger Courts on Freedom of Expression, presented at a joint session of the Law Division and History Division of the Association for Education in Journalism and Mass Communication, San Antonio, Texas, August 1987.

[1]Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 3 L.Ed. 2d 1407 (1959); Howard v. Lyons, 360 U.S. 593, 3 L.Ed. 2d 1454 (1959); Barr v. Matteo, 360 U.S. 564, 3 L.Ed. 2d 1434 (1959). An example of the Supreme Court supervising local federal courts is the 1919 decision, Washington Post Co. v. Chaloner, 250 U.S. 290, in which the Court reviewed a $10,000 libel judgment of a District of Columbia trial court which had been affirmed by the U.S.Court of Appeals. The Court relied on the common law and not on the constitution when it ruled that the jury--not the judge--should decide whether a libelous or innocent meaning of a message is applicable.

[2]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 L.Ed. 2d 296 (1971).

[3]F. Coonradt, The Law of Libel Has Been All but Repealed, 60 Quill 16-19 (February 1972).

[4]Gertz v. Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789 (1974); Time, Inc. v. Firestone, 424 U.S. 448, 47 L.Ed. 2d 154 (1976).

[5]Hutchinson v. Proxmire, 443 U.S. 111, 61 L.Ed. 2d 411 (1979); Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 61 L.Ed. 2d 450 (1979).

[6]Supra note 1.

[7]New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed. 2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 13 L.Ed. 2d 125 (1964); Henry v. Collins, 380 U.S. 357, 13 L.Ed. 2d 892 (1965).

[8]Rosenblatt v. Baer, 383 U.S. 75, 15 L.Ed. 2d 597 (1966); Ashton v. Kentucky, 384 U.S. 195, 16 L.Ed. 2d 469 (1966); Curtis Publishing Co. v. Butts, Associated Press v. Walker, 388 U.S. 130, 18 L.Ed. 2d 1094 (1967); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 19 L.Ed. 2d 248 (1967); St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed. 2d 262 (1968); Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811 (1968); Linn v. United Plant Guard Workers, 383 U.S. 53, 15 L.Ed. 2d 582 (1966); Time, Inc. v. Hill, 385 U.S. 374, 17 L.Ed. 2d 456 (1967).

[9]Greenbelt Cooperative Publishing Assoc. v. Bresler, 398 U.S. 6, 26 L.Ed. 2d 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265, 28 L.Ed. 2d 35 (1971); Time, Inc. v. Pape, 401 U.S. 279, 28 L.Ed. 2d 45 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 28 L.Ed. 2d 57 (1971); Hutchinson v. Proxmire, 443 U.S. 111, 61 L.Ed. 2d 411 (1979); Herbert v. Lando, 441 U.S. 153, 60 L.Ed. 2d 115 (1979); McDonald v. Smith, 472 U.S. 479, 86 L.Ed. 2d 384 (1985).

[10]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 L.Ed. 2d 296 (1971); Gertz v. Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789 (1974); Time, Inc. v. Firestone, 424 U.S. 448, 47 L.Ed. 2d 154 (1976); Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 61 L.Ed. 2d 450 (1979); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ---,, 89 L.Ed. 2d 783 (1986).

[11]Seattle Times Co. v. Rhinehart, 467 U.S. 20, 81 L.Ed. 2d 17 (1984); Bose Corp. v. Consumers Union, 466 U.S. 485, 80 L.Ed. 2d 502 (1984); Calder v. Jones, 465 U.S. 783, 79 L.Ed. 2d 804 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 79 L.Ed. 2d 790 (1984); Anderson v. Liberty Lobby, Inc., 477 U.S. ---, 91 L.Ed. 2d 202 (1986).

[12]Letter Carriers v. Austin, 418 U.S. 264, 41 L.Ed. 2d 745 (1974); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 42 L.Ed. 2d 419 (1974); Dun Bradstreet v. Greenmoss Builders, 472 U.S. 749, 86 L.Ed. 2d 593 (1985).

[13]Supra note 6.

[14]Supra note 6, 3 L.Ed. 2d at 1449.

[15]Id. at 1452.

[16]Supra note 7, 11 L.Ed. 2d at 717-719.

[17]Supra note 7, 13 L.Ed. 2d at 131.

[18]Id.

[19]Supra note 8, Associated Press.

[20]Supra note 8, Curtis Publishing Co. at 1113.

[21]Id.

[22]Supra note 8, Time, Inc. at 470.

[23]Id. at 473.

[24]Supra note 10.

[25]Supra note 11.

[26] Id.

[27] Supra note 12.

[28] Supra note 9.

[29] Supra note 11.

[30] Supra note 9.

[31] Supra note 11.

[32] Supra note 9.

[33] Supra note 10.

[34] Id.

[35] Id.

[36] Supra notes 9 and 10.

[37] Supra note 12.

[38] Supra note 2, 29 L.Ed. 2d at 321-322.

[39] Supra note 8, 15 L.Ed. 2d at 607.

[40] Supra note 12, 86 L.Ed. 2d at 606.

[41] Id. at 607-608.

[42] Supra note 7, 11 L.Ed. 2d at 717.

[43] Supra note 12, 86 L.Ed. 2d at 613.

[44] Supra note 9, 28 L.Ed. 2d at 42-44.

[45] Supra note 10, 61 L.Ed. 2d at 458.

[46] Supra note 8.

[47] Supra note 12, 41 L.Ed. 2d at 763.

[48] Supra note 8, 18 L.Ed. 2d at 1120.

[49] Supra note 1, 3 L.Ed. 2d at 1412.

[50] Supra note 9, 26 L.Ed. 2d at 15 and 19.

[51] Supra note 12, 41 L.Ed. 2d at 763 and 769.

[52] Supra note 8, 17 L.Ed. 2d at 474 and 483.

[53] Supra note 10, 47 L.Ed. 2d at 172 and 180.

[54] Supra note 1, 3 L.Ed. 2d at 1452.

[55] Supra note 4, 41 L.Ed. 2d at 823.

[56] Supra note 9.